

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 11, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP271**

**Cir. Ct. No. 2012GF238**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE OCCUPATIONAL LICENSE OF JASON R. KELLNER:**

**JASON R. KELLNER,**

**PETITIONER-APPELLANT,**

**V.**

**STATE OF WISCONSIN,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
CAROLINA MARIA STARK, Judge. *Affirmed.*

¶1 BRENNAN, J.<sup>1</sup> Jason R. Kellner, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 351.07(1) petition for an occupational

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

driver's license. Because we conclude that the circuit court properly exercised its discretion when it denied the petition, we affirm.

### **BACKGROUND**

¶2 Kellner was convicted of three operating a motor vehicle while intoxicated ("OWI") counts, for incidents occurring on September 30, 2007, October 27, 2007, and February 14, 2010. On March 25, 2010, Kellner's driver's license was revoked for five years as a habitual traffic offender.

¶3 On December 12, 2012, as a habitual traffic offender, Kellner petitioned the circuit court for an occupational driver's license pursuant to WIS. STAT. § 351.07(1). In the petition, Kellner told the circuit court that he needed the occupational driver's license to keep his job because the co-worker with whom he had been carpooling was no longer employed with the company.

¶4 On December 13, 2012, the circuit court held a hearing on Kellner's petition. Kellner appeared *pro se*. There were no other appearances on behalf of the State or otherwise.

¶5 The circuit court explained to Kellner that it had reviewed his petition and supporting documents. The documents included pay stubs from his current employer, an auto insurance identification card, a victim impact panel certificate of attendance, a certification of completion of a Genesis Behavioral Services Intervention AODA Program, and a financial responsibility form. The documents also included Kellner's statement about his employment, about completing probation and paying off fines, about severing ties with individuals who had a negative influence on him in the past, about being in a committed

relationship for two years, and about transforming his life to become a responsible and contributing member of society.

¶6 The circuit court then stated on the record that it was “concerned to see that there have been three OWIs that you were convicted for within about a two-and-a-half-year period from September of 2007 to February 2010.” It further noted that two of the convictions were less than a month apart. The court ultimately concluded that it did not “see a compelling reason at this point” to grant Kellner’s petition despite “some legitimate reasons for applying for the occupational license.”

¶7 The circuit court then rejected Kellner’s suggestion that it should have asked him for more information about the OWI offenses, stating “I’ve considered what I need to consider ... I see the dates. And so the details of the OWIs aren’t really what are at issue. They’re on the record, and I’ve already made my decision.” Kellner then stated that he had just “lost [his] child” prior to the first two OWI offenses, and he began to mention his engagement, but the circuit court reiterated that the petition was denied.

¶8 On February 1, 2013, Kellner filed a notice of appeal. We remanded the case back to the circuit court for entry of a written order and noted that the Milwaukee County Circuit Court was not the proper respondent to an appeal from its own ruling. We then directed that the caption be amended to name the State as the respondent, and that the district attorney be included as the State’s representative because the district attorney represents the public’s interest in revocation proceedings under WIS. STAT. §§ 351.027 and 351.04, because “[i]t may be” that the district attorney provides representation in an appeal under WIS. STAT. § 351.07, and because this is an appeal to be decided by one judge

under WIS. STAT. § 752.31(2)(c). We later issued a second order, renewing our direction that the circuit court enter a written order.

¶9 On June 17, 2013, the circuit court entered a handwritten order that denied Kellner's petition and that stated: "Given that [Kellner] had 3 OWI convictions from September 2007 to February 2010, and two of those offense dates were very close in time (9/30/07 and 10/27/07), the information presented by [Kellner] does not convince the court that his previous conduct as a traffic offender will not be repeated."

¶10 On September 4, 2013, the Wisconsin Department of Justice ("DOJ") filed a letter with this court on behalf of the district attorney, stating that: (1) the district attorney was not a proper representative of the State under WIS. STAT. § 351.07 or on appeal; and (2) the circuit court's order was not subject to appeal because the decision was administrative rather than judicial and was only an interim step in the issuance of an occupational driver's license.

¶11 We construed the DOJ's letter as a motion to dismiss for lack of jurisdiction and denied the motion because WIS. STAT. § 351.10 expressly permits appeals to the court of appeals from any order of "a court" entered under WIS. STAT. ch. 351. We now turn to the substance of the issue before us.

## **DISCUSSION**

¶12 As an initial matter, the State argues that the circuit court's decision is not reviewable on direct appeal because it is an interim, administrative decision reviewable only as a supervisory writ pursuant to WIS. STAT. § 227.52. We need not resolve this issue because whether the circuit court's order is reviewable on direct appeal or by petition for supervisory writ, we conclude that the circuit court

properly exercised its discretion and we affirm. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (“An appellate court should decide cases on the narrowest possible grounds.”); *see also State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶17, 271 Wis. 2d 633, 681 N.W.2d 110 (A petition for a supervisory writ will not be granted unless, among other things, the circuit court acted in violation of a plain duty).

¶13 WISCONSIN STAT. § 351.07(1) permits “[a] person whose operating privilege has been revoked ... as a habitual traffic offender may,” “after 2 years of the period of revocation have elapsed,” to “petition a judge of the circuit court for the county in which the person resides for an order authorizing the issuance of an occupational license.” *Id.* The statute dictates that “[t]he person’s petition shall include a compelling reason why the person should be granted an occupational license and additional reasons why the judge should believe that the person’s previous conduct as a traffic offender will not be repeated.”<sup>2</sup> *Id.*

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<sup>2</sup> In its entirety, WIS. STAT. § 351.07(1) states:

A person whose operating privilege has been revoked under this chapter as a habitual traffic offender may, after 2 years of the period of revocation have elapsed, petition a judge of the circuit court for the county in which the person resides for an order authorizing the issuance of an occupational license allowing the operation of vehicles other than commercial motor vehicles. The person’s petition shall include a compelling reason why the person should be granted an occupational license and additional reasons why the judge should believe that the person’s previous conduct as a traffic offender will not be repeated. The judge shall state his or her reasons for granting or denying the petition on the record. If the judge grants the petition, the judge shall issue an order authorizing the issuance of an occupational license, limited to the operation of vehicles other than commercial motor vehicles, to the person under s. 343.10. The clerk of the court shall file a copy of the order with the department, which shall become a part of the records of the

(continued)

¶14 The parties agree that the circuit court’s decision whether to grant Kellner’s WIS. STAT. § 351.07(1) petition is discretionary.<sup>3</sup> We defer to a circuit court’s exercise of discretion and affirm its decision so long as it is based upon the facts of record and relies on the appropriate law. *See State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). The circuit court properly exercised its discretion here.

¶15 Prior to issuing its decision, the circuit court expressly told Kellner on the record that it:

had an opportunity to review the application that you’ve submitted, the letter that you’ve submitted, your Wisconsin Department of Transportation driving record, and a number of other documents that you’ve submitted documenting your employment, documenting your insurance, documenting that you’ve attended the victim impact panel, and also that you’ve gone to the Genesis Behavioral Services, and some other documents that you’ve submitted.

¶16 Despite the circuit court’s review of all of those documents, the court found no “compelling” reason to authorize the issuance of the occupational driver’s license at that time. The circuit court emphasized its particular concern that Kellner had been convicted of three OWIs within a two-and-one-half year period, and that two of the convictions were very close to each other in time. The

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department. Upon receipt of the court order, the petitioner shall be considered an applicant by the department for purposes of s. 343.10.

<sup>3</sup> The State claims, without any citation to authority, that WIS. STAT. § 351.07(1)’s compelling-reason requirement “plainly” dictates that the circuit court’s decision is discretionary. In his brief, Kellner does not state the appropriate standard of review nor has he filed a reply brief to argue that discretionary review is inappropriate. As such, we adopt discretionary review as the appropriate standard of review in this instance. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

circuit court acknowledged that Kellner “had some legitimate reasons for applying for the occupational license,” but the court did not find those reasons to be “compelling reasons at this point” given the severity of Kellner’s prior actions. These reasons are sufficient to support the court’s discretionary decision to deny Kellner’s petition.

¶17 In so finding, we reject Kellner’s arguments that the circuit court’s findings were in error.

¶18 First, Kellner faults the circuit court for failing to consider both the number of his prior traffic convictions *and* the seriousness of his prior traffic convictions pursuant to WIS. STAT. § 343.10(4). However, Kellner was a habitual traffic offender who was required to, and did, file a WIS. STAT. § 351.07(1) petition for an occupational driver’s license. As such, the requirements set forth in § 343.10(4) are inapplicable.

¶19 Second, Kellner contends that the circuit court erred when it failed to let him explain the mitigating details of his three OWI offenses. However, Kellner cites to no authority requiring the circuit court to permit Kellner to provide mitigating information in addition to the supporting documents he submitted with his petition. Kellner was provided an opportunity to submit documents in support of his petition with the petition itself. The circuit court considered that information and no more was required.

¶20 Finally, Kellner claims that the circuit court failed to consider the documentation that he submitted in support of his petition. To the contrary, the circuit court expressly stated that it considered that information. The court simply concluded that the documents provided by Kellner did not provide a compelling reason to grant his petition for an occupational driver’s license given the

seriousness and closeness in time of Kellner's OWI convictions. In doing so, the circuit court acted within its discretion.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.



